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NO. 75-462

IN THE UNITED STATES SUPREME COURT

NATIONAL CAR RENTAL SYSTEM, INC. NO. 74-1473
Plaintiff/Appellee
Cross-Plaintiff

VS. UNITED STATES
COURT OF APPEALS

BETTER MONKEY GRIP COMPANY
AND WILCO TRUCK RENTAL, INC.
Defendants/Appellants
Cross-Appellants

PETITION FOR WRIT OF CERTIORARI BY NATIONAL CAR RENTAL SYSTEM, INC. FROM JUDGMENT AGAINST IT RENDERED BY THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

(This Petition involves same case as the Petition in No. 75-206)

Ralph W. Currie
1310 Praetorian Building
Dallas, Texas 75201
Attorney for Petitioner

Herbert S. Bonney, Jr.
1822 Fidelity Union Tower
Dallas, Texas 75201
Attorney for Respondents

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This petition of National Car Rental Systems, Inc., for Writ of Certiorari to the Supreme Court of the United States of America, respectfully shows:

I.

Better Monkey Grip Company and Wilco Truck Rental, Inc., Respondents herein, have filed as Petitioners their Petition for a Writ of Certiorari in this same cause. It was docketed on August 12, 1975, and bears Docket No. 75-206.

The United States Court of Appeals for the Fifth Circuit rendered judgment [511 Fed.2d. 742] reversing a judgment of the United States District Court for the Northern District of Texas, and remanded the cause for a new trial. Said judgment was in Petitioner's favor. Petitioner filed a petition for rehearing with the appellate court, which was denied June 25, 1975. The opinion of the

district court, the opinion of the Court of Appeals, and the order which overruled the petitions for rehearing are attached as appendices to the petition for certiorari filed by Respondents herein in said Docket No. 75-206.

II.

A statement of the grounds on which the jurisdiction of this Court is invoked are:

(i). Date of judgment: April 21, 1975; time of its entry: April 21, 1975.

(ii). Date of per curiam order denying Petitions for Rehearing: June 25, 1975.

(iii). Statutory provision believed to confer jurisdiction on this Court to review judgment in question by writ of certiorari: Title 28 § 1254(1), Judicial Code.

The questions presented for review are:

A. The jury verdict being a special verdict, and no party having requested that the trial court submit to the jury a fact issue as to National's obligation under the circumstances to supply the requested information for the buy-out figures, did the Court of Appeals err in failing to hold, as required by the provisions of Rule 49(a), Federal Rules of Civil Procedure, that the court is deemed to have made a finding that National owed no such obligation?

B. Did the Court of Appeals err in reversing the judgment of the trial court when the jury expressly found in answer to special issue No. 8 (not set aside) that Monkey Grip suffered no damage because said figures were not furnished until August 5, 1971?

STATEMENT OF THE CASE

This suit is one upon a written contract. The basis of federal jurisdiction in the trial court is diversity of citizenship. The case is the same case already docketed in this Court under No. 75-206, which is a Petition for Writ of Certiorari filed by our adversaries. Appearing as appendices to their Petition (Appendix A through Appendix D) are: The judgment of the Court of Appeals for the Fifth Circuit; its Order denying Petitions for Rehearing; the Memorandum Opinion and Order of the trial court; and the Opinion of the Court of Appeals [reported at 511 F.2d.724]. By telephone inquiry to the office of the Clerk of this Court we learned that reproduction of these appendices and attaching the same to this Petition was not necessary. Hence, they have been omitted here. Those appearing in No. 75-206 are incorporated by reference.

National's right to recover under the contract was incontrovertibly established except to the extent, if any, it was defeated or diminished by the affirmative defense asserted by Monkey Grip. This was, in effect, that Monkey Grip had been relieved of its obligation to purchase the motor vehicles which the contract obligated it to purchase because National did not furnish the necessary buy-out figures until August 5, 1971, which, according to Monkey Grip was 19 days late. Being an affirmative defense, the burden was upon Monkey Grip to establish it.

To establish such defense, Monkey Grip had to prove:

1. That National owed Monkey Grip the duty to furnish these figures; and,

2. That the delay in furnishing the figures until August 5, 1971, was a breach of that duty; and,

3. That as a result of that breach of duty, Monkey Grip sustained monetary loss or damage and the amount of such damage.

The Court of Appeals correctly held that the contract imposed no such duty on National. The duty, if it existed, arose out of National's "failure to co-operate". This, in turn, arose, if at all, because of Monkey Grip's claim that it did not, at time of cancellation, have all of the information necessary to compile the figures. It is not contended that Monkey Grip advised National of this lack.

The Court of Appeals held that this fact issue should have been submitted to the jury; that failure to do so was error. However, no party requested any such issue. The jury did find: that the parties intended for the buy-out information to be supplied within sixty days; that July 17, 1971, was a reasonable time for furnishing the same;

that August 5, 1971, was not a reasonable time; that the delay in furnishing the figures caused Monkey Grip no damage.

The Court of Appeals correctly held that the issue first to be determined was whether National had the obligation to furnish the requested information. No error was assigned in the case on appeal to the failure of the trial court to submit such issue.

Hence, we respectfully submit that the Court of Appeals erred in not applying Rule 49(a), Federal Rules of Civil Procedure, and in failing to hold that the trial court is deemed to have found that National owed no such obligation. Had such holding been made, the question of whether the information which was furnished was timely supplied would have become immaterial. Such is the inevitable effect of the holding which was made by the Court of Appeals.

Had the Court of Appeals given to the trial court's judgment the benefit of the fact finding which Rule 49(a) requires it was deemed to have made (the only finding which could have been made in support of the judgment rendered) the trial court's judgment in favor of National on its contract would have had to be affirmed, at least to the extent that recovery was granted. This is so, because Monkey Grip simply failed to establish the first of the elements making up its affirmative defense, to-wit: no breach of duty on the part of National.

As heretofore stated, the jury expressly found that although the delay in supplying the figures was unreasonable, Monkey was not damaged thereby. This answer of the jury was fatal to Monkey Grip's recovery under its affirmative defense of National's failure to co-operate. The cases cited

in the Opinion of the Court of Appeals dealing with Monkey Grip's contention on this point [511 F.2d.729], do not support Monkey Grip's theory that because the information was not *timely* furnished, it was relieved of any obligation to purchase the equipment. The authorities cited and others do no more than hold that where one party is unable to perform its obligation because of the failure of the other party to do that which is necessary to enable the first party to perform, the first party is excused from performance so long (but only so long) as the performance continues to be rendered impossible by the failure of the other party. Under these authorities, therefore, when the requested information was furnished, Monkey Grip was then no longer at liberty not to perform.

Under the factual situation here, the uniform rule of law is that Monkey Grip

was entitled to compensation only for such damages as it may have sustained by reason of the figures not having been furnished on July 17, 1971, conceding, *arguendo*, that National owed that duty. The jury answered this special interrogatory that no damages were sustained because the figures were not furnished until August 5. This answer, which was not set aside, was fatal to Monkey Grip's right to recover anything against National on account of its defense that National had failed to co-operate. This is the estab- law in Texas. *Weissberger v. Brown-Bellows, Smith, Inc.* (Tex.Civ.App.,1956) 289 S.W.2d. 813, 818 (point 12). Also, it is in line with the fundamental rule of law dealing with damages for breach of contract, which is that for breach of contract the party wronged is entitled only to be placed in the same position he would have occupied

had the breach not occurred.

We respectfully submit, therefore, that the trial court's judgment, that National was entitled to recover on the written contract was the correct one, no matter whether the reasoning be that it was based on the jury verdict, or that certain answers of the jury were properly disregarded. It is fundamental law that if the trial court reached the correct result, the judgment is entitled to be upheld regardless of the reasoning used.

All of the contentions here presented were duly presented to the Court of Appeals in our Petition for Rehearing.

The Court of Appeals should have affirmed the trial court on the point which it considered and then proceeded to consider the other points raised on the appeal and cross appeal. We respectfully submit that this Court should so hold.

REASONS FOR THE ALLOWANCE OF THE WRIT

We respectfully submit that Rule 19 1(b) of the Supreme Court Rules is sufficiently broad to justify this Court, in the exercise of its sound judicial discretion, to grant the Petition here presented. Prior to presenting our reasons for this statement, however, we feel constrained to make the following observations:

While this case is of considerable importance to National, we are unable, in good conscience, to assert that it is one involving principles the settlement of which is important to the public, as distinguished from that of the parties. In truth, we think this Petition would not have been filed except for the fact that a Petition has already been filed by our adversaries, in Docket No. 75-206. We do believe that we have a stronger case for the writ to be granted than they do.

We, therefore, feel that we owe it to our client to present this Petition despite our reluctance to increase the burden on this Court in certiorari matters.

Here, the Court of Appeals has decided an important - indeed, controlling - state law question in a way which is in conflict with the established law of Texas. The particular state court decision is *Weissberger v. Brown-Bellows, Smith, Inc.*, (Tex. Civ.App.,1956) 289 S.W.2d 813, 818 (point 12). In that case the Texas court held: "It is established law that in order to recover damages because of delay in the performance of a contract, such damages must be shown to have resulted from the delay complained of, and that same would have been incurred except for such delay." Here, the Court of Appeals refused to apply the state law in this diversity case. Instead, it reversed the trial court's

judgment and remanded the case for a new trial despite the fact that the jury had, in response to the special interrogatory submitted, returned a verdict that Monkey Grip had sustained no damages because the information requested was not timely furnished. Under applicable state law, this finding alone, required judgment for the plaintiff, National, as against the affirmative defense asserted by Monkey Grip.

Also, the Court of Appeals departed from the accepted and usual course of judicial proceedings, in that it refused tc apply the provisions of Rule 49(a), Federal Rules of Civil Procedure, in this: There was no request that the jury determine whether, as a matter of fact, National had any duty to supply the requested information. Under the ruling of the Court of Appeals an affirmative finding was necessary to fix liability on National. The Court of

Appeals declined to hold that the trial court is deemed to have made a finding on the omitted issue in such manner as would support the judgment rendered by the trial court. The only such finding which could have been made is that National, in fact, owed no duty to supply the information. This would have controlled the disposition of the case and would have required an affirmance of the court below as against the defense asserted to the contract by Monkey Grip.

Finally, it appears that the remand by the Court of Appeals was prompted by "the failure of counsel to define sharply the factual issues" [511 F.2d.731]. Such rebuke could not properly apply to National's counsel. All the issues submitted (save the one on attorney's fees to National) were defense issues. We had no duty to frame the defendants' issues. That was the

duty of defense counsel. If done in such a manner that the verdict of the jury when returned failed to support the defense urged against our contract,the failure is chargeable to Monkey Grip alone.

Yet, under the holding of the Court of Appeals, National is the one who suffers. Not only are we required to re-try the case; we also lose the benefit of the supersedeas bond given for our protection on the appeal. This, incidentally, now appears to become a very substantial loss.

WHEREFORE, National prays that this Petition be granted, and that National be afforded the relief herein sought.

Respectfully submitted,

RALPH W. CURRIE,
Attorney for Petitioner,
National Car Rental Systems,
Inc.,

Three copies of this Petition have been mailed via first-class mail, postage paid to Herbert S. Bonney Jr., 1822 Fidelity Union Tower, Dallas, Tex

RALPH W. CURRIE